"(61) Whether or not made by way of will or deathbed gift, no *wakaf* or nazar made after the commencement of this Enactment and involving more than one-third of the property of the person making the same shall be valid in respect of the excess beyond such one-third unless expressly sanctioned and validated by all beneficiaries."

This Enactment came into force on March 29, 1956. The *wakaf* was created on June 13, 1961 and therefore section 61 applies. There has been no express sanction and validation of the *wakaf* by all the beneficiaries of Tengku Nik Maimunah. Apart from the Chenderong Concession she had other properties. It follows that only a third of her property as on June 13, 1961 is a valid *wakaf*. This means that her other property has first to be added to the Chenderong Concession and one third of the whole but consisting part of the Chenderong Concession only is subject to the *wakaf*.

For these reasons, I declare that the *wakaf* created by Tengku Nik Maimunah on June 13, 1961 is valid to the extent of one third of her property as of that date.

Order accordingly.

Solicitors: *Kirpal Singh Brar & Co.; Chung & Huang.*

MANOKARAN & ANOR. v. PUBLIC PROSECUTOR

[R.Cr.J. (Abdoolcader J.) October 10, 1978]
[Penang — Criminal Appeals Nos. 47 and 48 of 1978]

Criminal Law and Procedure — Plea of guilty by accused — Appeal against conviction — Powers of High Court — Power of revision — Case originally brought before President of Sessions Court — Accused charged and pleaded guilty — Plea of guilty not accepted and case adjourned — Special President calling up case in his court — Special President acting suo motu — Accused pleaded guilty and convicted — Whether "transfer" legal — Impartiality of courts of justice — Fairness of trial — Subordinate Courts Act, 1948, s. 104 and Third Schedule, Paragraph 3(2) — Courts of Judicature Act, 1964, s. 35 — Criminal Procedure Code (F.M.S. Cap. 6), ss. 305 and 325.

In this case the first appellant had been charged on two charges, one of criminal intimidation and the other relating to extortion; and the second appellant had been charged with two charges, abetment of the criminal intimidation by the first appellant and an alternative charge of conspiracy. The cases against the appellants were originally brought on June 2, 1978 before a President of the Sessions Court. The first appellant on being charged pleaded guilty to the two charges against him and then added that he was only making a joke. The learned President rejected his plea of guilty and adjourned the case for hearing on January 22, 1979. The second appellant on being charged claimed trial and the case against her was also adjourned for hearing on the same date. However on June 3, 1978 the Special President of the Sessions Court called up the cases against the appellants in his court. The appellants were charged and on their pleading guilty, they were convicted and sentenced, the first appellant to the maximum but concurrent term of 7 years on both charges and the second appellant to a term of 3 years' imprisonment on the substantive charge. The appellants appealed against their conviction and sentence.

Held: (1) in this case despite the plea of guilty by the appellants, it was open to the court to deal with the convictions in the exercise of its powers of revision if the circumstances of the case so warrant;

(2) there was no provision of law under which the Special President in this case could transfer the cases to himself and the transfer was therefore wrong and illegal and so were the convictions against the appellants;

(3) the convictions and sentences imposed on the appellants should be set aside and an order be made that the cases be tried before a Magistrate.

Cases referred to:-

(1) *Director of Public Prosecutions* v. *Shannon* [1975] A.C. 717.

(2) *R.* v. *Whitehouse* [1977] Q.B. 868.

(3) *In re Chunbidya & Ors.* (1934) 62 I.A. 36.

(4) *R.* v. *Sussex Justices, ex parte McCarthy* [1924] 1 K.B. 256, 259.

(5) *R.* v. *Essex Justices, ex parte Perkins* [1927] 2 K.B. 475, 488.

(6) *R.* v. *Thames Magistrates' Court, ex parte Polemis* [1974] 1 W.L.R. 1371, 1375.

CRIMINAL APPEAL.

Jag-Jit Singh for the appellants.

Hashim bin Datuk Haji Yusoff (Deputy Public Prosecutor) for the respondent.

Abdoolcader J. (delivering oral judgment): The cases against the 1st appellant, arraigned on two charges, one of criminal intimidation and the other relating to extortion, and the 2nd appellant, on a substantive charge of abetment of criminal intimidation by the 1st appellant and an alternative charge of criminal conspiracy, were called up on June 3 this year by the President of the Sessions Court conferred at the material time with special jurisdiction under section 63(3) (since repealed) of the Subordinate Courts Act, 1948, and on their plea of guilty and subsequent conviction the 1st appellant was sentenced to the maximum but a concurrent term of 7 years' imprisonment on both the charges preferred against him, and the 2nd appellant to a term of 3 years' imprisonment on the substantive charge. The appellants now appeal against both conviction and sentence.

Section 305 of the Criminal Procedure Code which is based on section 412 of the Indian Criminal Procedure Code of 1898 (since repealed and re-enacted in 1973) provides that there shall be no appeal by an accused person convicted on a plea of guilty except as to the extent or legality of the sentence. As a matter of passing interest, the position in England in this respect is statutorily governed by the provisions of section 2(1) of the Criminal Appeal Act, 1968 which afford only two grounds for an appeal against a conviction on a plea of guilty, namely, if there has been a wrong decision on a question of law or a material irregularity in the course of the trial. The law on this subject in England is fully discussed in the judgments of the House of Lords in *Director of Public Prosecutions* v. *Shannon*[1] in which there is a plea by two of the Law Lords to the effect that the scope of appeal against conviction in such an event should be extended to a case where the accused has pleaded guilty without understanding the nature of the charge or intending to admit that he was guilty. *Shannon*[1] was applied more recently in *Regina* v. *Whitehouse*[2] by the Court of Appeal in England.

I have however not only extensive powers of revision in criminal proceedings under the provisions of

section 325 of the Criminal Procedure Code but even wider powers conferred by section 35 of the Courts of Judicature Act, 1964, and the Deputy Public Prosecutor agrees that in a case like this where there is an appeal against conviction on a plea of guilty it is open to me to deal with the conviction in the exercise of my powers of revision if the circumstances of the case so warrant. I would merely add that in my view notwithstanding the provisions of section 305 of the Criminal Procedure Code an appeal against a conviction on a plea of guilty will still lie if the charge discloses no offence in law, in which event the conviction itself would be illegal and a nullity.

It is true that the matters complained of in this appeal have been brought to my notice by way of a record of appeal and the proceedings before me are headed in the criminal appeal, but, as I pointed out to counsel on both sides at the outset of this hearing, it is nevertheless open to me notwithstanding this to exercise my powers of revision in this matter, and I referred in this regard to the decision of the Privy Council in *In re Chunbidya & Ors.*[3] to the effect that when the High Court has before it on appeal a record of criminal proceedings, it can proceed to exercise its powers of revision if it chooses to do so and make the requisite order although precluded by another provision in the Criminal Procedure Code from doing so in the appeal.

Adverting now to the facts of this matter: what happened was that the two appellants were produced before another President of the Sessions Court on June 2. The 1st appellant pleaded guilty to the two charges against him and then added that he was only making a joke, as he put it. That President as a result rejected his plea of guilty, adjourned the case for hearing on January 22 next and granted him bail in the sum of $10,000 in one surety. The 2nd appellant claimed trial to both the substantive and the alternative charges, the case against her was also adjourned for hearing on the same date and bail granted in the sum of $1,000 in one surety.

Then within a matter of 24 hours, on the following day, a Saturday, the President of the Sessions Court against whose decision this appeal is made and who was conferred with special jurisdiction under section 63(3) of the Subordinate Courts Act as it then stood and styled Special President (fortunately the question of this nomenclature and the designation of his court as the Special Sessions Court no longer arises in view of the amendments effected to the Act on July 1 this year) called up the cases against the appellants in his court. Both appellants pleaded guilty and were sentenced as I have indicated earlier. I might add that the 1st appellant in mitigation again said that he 'merely did it as a joke', virtually repeating what he had stated the previous day before the other President and which apparently moved that President to reject his plea of guilty. The 2nd appellant said in mitigation that she 'had been misled' by the 1st appellant. Subsequently, there were applications for bail by both the appellants pending appeal to the High Court but bail was refused by the Special President although it appears from the record that the prosecution offered no objection.

Although he may perhaps have meant well, the Special President was, in my view, over-officious in what he did, and this over-officiousness on his part has regrettably produced certain unfortunate and undesirable offshoots, springing like Athena from the head of Zeus. It is vitally essential if we are to maintain and safeguard that high standard of justice, which is the only haven of safety and strength to which the citizen can steer his threatened barque of liberty, to avoid unnecessary risks of not only causing accused persons to complain but which would also reflect, and reflect adversely, on the administration of justice. I cannot and will not allow or tolerate the taking of any such risks and the concomitant consequences thereof.

However innocent might be the course of events that have transpired in this case, the question still remains of the impression created thereby in the mind of the disinterested man or woman on the Jelutong omnibus — the classic instance of the reasonable person in this country. As Lord Hewart C.J., has pointed out, "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly (seem) to be done" (*Rex* v. *Sussex Justices, Ex parte McCarthy*[4]). The original report of that case reads "but should manifestly and undoubtedly be seen to be done", but, as indicated by Avory J., in *Rex* v. *Essex Justices, Ex parte Perkins*[5] "the words 'be seen' must be a misprint for the word 'seem' ".

The Special President states in his grounds of judgment that 'there was every justification to deal with the case promptly and summarily'. A criminal trial does not however involve only the question of a mere allocation of court time; the accused must be afforded the opportunity of putting his tackle in order, and it would be pertinent and apposite in this respect to refer to a passage in the judgment of Lord Widgery, Lord Chief Justice of England, in *Regina* v. *Thames Magistrates' Court, Ex parte Polemis*[6] (at p. 1375):

> "To start with, nothing is clearer today than that a breach of the rules of natural justice is said to occur if a party to proceedings, and more especially the defendant in a criminal case, is not given a reasonable chance to present his case. It is so elementary and so basic it hardly needs to be said. But of the versions of breach of the rules of natural justice with which in this court we are dealing constantly, perhaps the most common today is the allegation that the defence were prejudiced because they were not given a fair and reasonable opportunity to present their case to the court, and of course the opportunity to present a case to the court is not confined to being given an opportunity to stand up and say what you want to say; it necessarily extends to a reasonable opportunity to prepare your case before you are called upon to present it. A mere allocation of court time is of no value if the party in question is deprived of the opportunity of getting his tackle in order and being able to present his case in the fullest sense."

It is a matter of the gravest public policy that the impartiality of the courts of justice should not be doubted, or that the fairness of a trial should be questioned; otherwise, the only bulwark of the liberty of the subject would be undermined.

It is now necessary to consider and deal with the matters that arise and the questions raised as a result of the Special President's unilateral assumption of these two cases and to refer to the reasons he gives in his grounds of judgment.

The first thing the Special President states in his grounds of judgment in this connection is that these cases were originally registered in the Sessions Court and the hearing was fixed for 1979, even though he had pleaded guilty, referring to the 1st appellant. But the point is that his plea of guilty was rejected on June 2 by the other President and his case was fixed for hearing on January 22 next together with that against the 2nd appellant who had claimed trial on the charges against her.

The next question that arises is that of the purported transfer of these two cases by the Special President to his court, designated the Special Sessions Court. The Deputy Public Prosecutor in the course of his submissions before me had perforce to admit, in answer to specific questions I put to him after referring him to certain provisions in the Subordinate Courts Act, that he does not know of any provision of law under which the Special President could transfer these cases to himself, that the transfer would appear to be wrong and illegal and *a fortiori* so would the convictions against the appellants. The question of the purported transfer itself raises three sub-questions of why, when and how, and other subsidiary questions to which there would appear to be from the record of proceedings no valid and effective answers if at all. For instance, why was it necessary for the charges to be read out once again to the appellants and their pleas taken when in fact this had already been done the day before?

Why were the cases transferred? The Special President states that he exercised his own initiative to hear the case and both appellants were produced in his court in order to advance the date of hearing whereupon they pleaded guilty and were sentenced in accordance with law. The Deputy Public Prosecutor informs me that he was not ready with his witnesses to proceed to a hearing of these cases on that day and there was therefore no question of the Special President being in a position to hear the case then, and at 11.30 a.m. on a Saturday morning at that. It is of some significance that the Special President uses the word 'whereupon' in his grounds of judgment when he states that both appellants were produced in his court whereupon they pleaded guilty. There is nothing in the record to show nor can the Deputy Public Prosecutor confirm that there was any indication of any retraction or change of plea on the part of the appellants for their cases to be called up again the very next morning within a matter of 24 hours before the Special President.

Bail had been granted the day before to both appellants. Apparently it was too late for the bail bonds to be executed on June 2 and the bailor was told to come the next morning. The bailor returned accordingly the next day but could not find the appellants and on enquiry he discovered they had been produced before the Special President in the Special Sessions Court and he went there to find the charges being read out to the appellants. Why were the appellants not released on bail in the morning of June 3? There is no indication whatsoever that the bail granted the previous day had been revoked.

When was the transfer effected? Apparently this was done on June 3 itself by the Special President of his own motion without any application whatsoever by anyone, and as he puts it in his grounds of judgment he was exercising his own initiative to hear the case.

How was the transfer made? All that is apparent on the record and from the submissions of counsel on both sides is that the appellants were called up before the Special President, and the cases against them were dealt with virtually *de novo* notwithstanding what had transpired on the previous day before the other President and while these cases were still registered as Sessions Court cases. It is therefore abundantly clear that the Special President acted *suo motu* and unilaterally in taking over these two cases. It is also significant that there is no order whatsoever appearing anywhere in the record of proceedings for the transfer of the two cases to the Special Sessions Court.

There are two provisions in the Subordinate Courts Act which are relevant on this aspect of a transfer but neither of which is applicable to the purported transfer of these two cases to the Special Sessions Court. The first is section 104 of the Act which empowers a President or Magistrate to transfer a criminal cause or matter to any other Sessions Court or Magistrate's Court which has jurisdiction to hear and determine the same. This section does not apply as the President who heard the case on June 2 had jurisdiction and section 104 empowers a transfer by a transferor court whereas in these two cases there was in fact a purported transfer by a transferee court to itself. The other provision in the Act is paragraph 3(2) of the Third Schedule thereto which empowers a Sessions or Magistrate's Court on application or of its own motion to transfer any proceedings to another court of co-ordinate jurisdiction. This provision cannot apply either as once again the transfer was purportedly effected by the transferee court to itself and not by the transferor court as should be the case and, in any event, it was not to a court of co-ordinate jurisdiction as the Special President had wider powers than a President by virtue of the provisions of section 63(3) of the Act then in force.

I should perhaps mention that after counsel on both sides had concluded their submissions before me and as I was about to begin delivering judgment in this matter, the Deputy Public Prosecutor sought leave to address me once again to submit, perhaps as a belated afterthought and by way of salvage although he had already agreed that the transfer of these two cases to the Special Sessions Court was improper and illegal, that there was in fact no question of a transfer as the Special President had jurisdiction to hear the cases. I then asked him how, if that was indeed so, the Special President could sentence the 1st appellant to 7 years' imprisonment which was beyond the jurisdiction of the Sessions Court as such, and why it was necessary to regularise what took place by giving Special Sessions Court case numbers to the cases after their conclusion, quite apart from the necessity and propriety of his hearing these cases which had already been dealt with only the previous day, whereupon he immediately said he would leave the matter to me, a supplication or formula or call it what you will which, with respect, has since become the stock answer and the standard and perhaps last refuge of the des-

parate who are unable to sustain or pursue an argument advanced and is only a euphemism for abandoning it.

The Deputy Public Prosecutor in the course of his address to the Special President on the matter of sentence said that 'the charges are of a very serious nature' and urged 'a very deterrent sentence'. The Special President in his grounds of judgment equally stresses the serious nature of the charges. Of course, the charges are very serious, but in view of their gravity it is astonishing, to say the least, that no one thought of asking the appellants if they would in the circumstances wish to be legally represented or at least consult a lawyer, and more particularly so as a plea of not guilty had been entered for the 1st appellant by another President only the day before.

It is equally clear that the appellants were never told that they were then appearing in a different court with enhanced jurisdiction nor was there any indication given by the Special President that he was sitting as a Special President conferred with enhanced jurisdiction in the matter of sentence, and the Deputy Public Prosecutor confirms this. Assuming for a moment that the Special President could in fact lawfully take over these two cases, then they should have been proceeded with if at all as Sessions Court cases *per se*, but the Special President unquestionably took over the cases in the exercise of his powers as a President conferred with special jurisdiction and proceeded to impose a term of 7 years' imprisonment on the 1st appellant which is the maximum term imposable for each of the offences in the two charges preferred against him and which he could do by virtue of the then operative provisions of section 63(3) of the Act and which the other President who heard the cases on June 2 could not, as by the provisions of section 64(1)(a) of the Act as it then stood his power of imposing corporal punishment was limited to a maximum term of 5 years' imprisonment.

The Special President then goes on in his grounds of judgment to deal with the question of the case numbers allocated to the two cases and admits that Special Sessions Court case numbers were given to the two cases after they had been disposed of. Apparently the whole thing was done in such indecorous haste that when the appellants were brought before him on June 3 at about 11.30 a.m., as the Deputy Public Prosecutor informs me, the cases were still registered as Sessions Court cases and the original Sessions Court case numbers on the charge sheets were cancelled and substituted with Special Sessions Court case numbers only after the appellants had been convicted and sentenced. The Special President states in his grounds of judgment that this does not however invalidate the convictions and sentence and attempts to justify this by contending that the registration of a case is a clerical and administrative act, and that when an accused person is before his court, it can deal with him even if he was unlawfully brought before it, and in support refers as authority for this proposition two cases, one on the question of unauthorised entry on premises in a lottery case and the other pertaining to the admissibility of evidence illegally obtained, which in relation to his arbitrary and unwarranted action in calling up these cases in his court are about as relevant or as useful as footwear for the limbless torso.

The Special President's laboured and extraordinary attempt at self-justification, couched in the superlative degree, is illogical and decidedly not convincing, valid or sustainable, and the law he cites and seeks to rely on in support is totally irrelevant and wholly unrelated and extraneous to the context of the appellants' complaints in this matter. It would therefore appear that not only was the whole course of events culminating in the convictions and sentence improper but also illegal, as the Deputy Public Prosecutor properly concedes.

In the circumstances I have adumbrated, I must intercede and I accordingly proceed to do so. There will be no order on the appeal but in the exercise of my powers of revision I set aside the convictions and sentence imposed on both the appellants by the Special President and order that they be retried before a Magistrate who has now jurisdiction in the matter in view of the recent amendments to the Subordinate Courts Act. I allow bail to the 1st appellant in the sum of $5,000 in one surety and to the 2nd appellant in the sum of $1,000 also in one surety, and direct the Deputy Public Prosecutor to arrange for both appellants to be produced in the Magistrate's Court to-morrow morning.

Order accordingly.

Solicitors: *Jag-Jit Singh & Co.*

KOAY HENG SIEW v. PENANG ADVENTIST HOSPITAL

[O.C.J. (Gunn Chit Tuan J.) October 26, 1978]
[Penang — Civil Suit No. 383 of 1977]

Practice and Procedure — Service — Application to set aside — Person served — Locus standi — R.S.C. 1957 O. 12 r. 30, O. 70 r. 1.

This was an application by one S. Valaithum on whom a copy of the writ of summons in this suit was served for an order that the said writ of summons and/or that service thereof on him be set aside on the following grounds: a) the defendant named being a hospital had no legal personality and was not a legal person, b) the copy of the said writ of summons was personally served on him (S. Valaithum) without any statement in or notice attached to the said writ of summons thereof specifying in what capacity or for what reason the said service was effected on him. The plaintiff opposed on two grounds: a) that the said S. Valaithum had no *locus standi* to enter conditional appearance and b) that the said application was bad in that it had not complied with Order 12 rule 30 and contended that it was mandatory for the application to be supported by an affidavit.

Held: (1) the applicant in this case had *locus standi* not only because the plaintiff had served process on him but also because it was clear from the definition of "defendant" in Order 71 of the Rules of the Supreme Court that it would include any person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings;

(2) as a matter of practice it would be useful to support such an application by an affidavit to explain the grounds of objection relied on yet there was no such legal requirement in the Rules of the Supreme Court which only required an application to set aside proceedings for an irregularity to be made by summons or motion and that the grounds of objec-